be the first collocator, particularly in smaller end offices and remote terminals. Thus, the Commission's proposal may have the effect of making collocation *harder* to obtain, not easier. To alleviate these problems, the Commission should adopt several rules regarding an ILEC (or its affiliate's) use of potential collocation space. First, an ILEC should explicitly be prohibited from warehousing collocation space. Clear and enforceable rules should be developed to identify prohibited warehousing and to require prompt corrective action. Second, as discussed above, the Commission should prohibit the ILEC or its affiliate from using the "last" available space for collocation. Third, the Commission also should limit ILECs (including their affiliates) from using (including "reserved"uses) more than one-third (33%) of the space potentially available for collocation. Particularly in smaller offices, this limit will be necessary to ensure that sufficient space exists for other potential collocators

VI. THE COMMISSION SHOULD DEFINE SPECIFIC ADDITIONAL ADVANCED SERVICE UNEs USING A TECHNOLOGY NEUTRAL FUNCTIONAL APPROACH

The Commission asks parties to recommend specific unbundling requirements for advanced communications services.[77] As the Commission already has recognized, competitive entry into the growing market segment for advanced communications services requires the ILECs to sell fully-equipped xDSL loops and DSL capable loops as UNEs.[78] It is equally important that the Commission establish UNEs enabling new entrants to route this traffic from

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(...continued)

76 *NPRM*, ¶ 146.

77 *NRPM*, ¶180.

78 Bell Atlantic and SBC have petitioned the FCC for reconsideration of these requirements. *See Petitions for Reconsideration and Clarification of Action in Docketed Proceedings*, Report No. 2297 (Sept. 18, 1998). CompTel opposes these petitions, and will file its (continued...)

their own (or the ILEC's) DSLAM to their selected interface at cost-based rates. A new entrant cannot use xDSL loops to compete effectively against an ILEC if it cannot efficiently transport packet-switched traffic to its network interconnection points. Therefore, the FCC should require the ILECs to provide the facilities and functionalities necessary for such data transport as UNEs at cost-based rates.

CompTel submits that at least two broad categories of facilities and functionalities are necessary for new entrants to transport advanced communications traffic efficiently.[79] CompTel recommends that the Commission define at least two new network elements that would provide the functionality necessary to support the competitive provision of data services using xDSL and DSLAM technologies. First, the Commission should define a "shared data transport" network element that would provide data transport between a CLEC's data network any other point on the ILEC's data network interfacing with a packet device. By way of example, this network element would encompass the transport functionality from an interconnection point between an ILEC's packet network and the CLEC's network to the back-end of a DSLAM being used to separate voice from data traffic. The ILEC would have the obligation to provide this transport function at the same level of quality, and with the same choice among transmission modes (e.g., Internet Protocol, ATM), as the ILEC's own data traffic.

Second, the Commission should define a "shared data channel" network element that would extend from the interface with the CLEC's data network to a customer location. Such an

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(...continued)
opposition according to the pleading cycle established therein.

79 CompTel does not intend for these categories to be exhaustive. As the Commission and the industry begin to focus upon this issue, CompTel expects that additional categories, or new subcategories, of UNEs will be developed.

element would include the "shared data transport" functionality described above, as well as the data transport provided by an xDSL loop and DSLAM. Consistent with the Commission's earlier definition of the loop, this network element would be available only in conjunction with the entrant's purchase of the entire functionality of the local loop. That is, an entrant (or ILEC affiliate) could not separately obtain the data-enabling spectrum of the loop without also purchasing the voice-enabling spectrum. CompTel believes that such an approach is appropriate to avoid the impossible task of cost-assignment between these functions. The arbitrary nature of such cost-assignments would be particularly troublesome in an environment where the data-spectrum might be purchased by an ILEC affiliate offering data services in concert with voice-services offered by the ILEC itself. The "shared data channel" network element should provide the entrant with the flexibility to use a DSLAM with (or without) the separation of analog voice traffic.[80]

The 1996 Act gives the Commission plenary authority to require the ILECs to offer these and other UNEs for advanced communications services. The statute defines the term "network element" broadly to include not only "a facility or equipment," but also "features, functionas, and capabilities that are provided by means of such facility or equipment" for the "transmission, routing, or other provision of a telecommunications service."[81] Congress gave the Commission the responsibility of "determining what network elements should be made available" by ILECs.[82] The U.S. Court of Appeals for the 8th Circuit recently clarified the Commission's broad authority

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80 So long as the CLEC pays for the exclusive functionality of the local loop, it is immaterial as to whether its analog capability is used or not in the final service offered by the CLEC.

81 47 U.S.C. §153(29).

82 47 U.S.C. §§251(c)(3); 252(d)(2).

over UNEs when it upheld the Commission's decisions requiring ILECs to offer shared transport as a UNE. The Court held that "it is within the authority of the FCC to determine which of these network elements – the facilities, the functions, or both – incumbent LECs must make available on an unbundled basis."[83] Therefore, the Commission has unambiguous statutory authority to order ILECs to offer facilities and functions as one or more UNEs for the transport of advanced communications traffic.

VII. THE COMMISSION NEED NOT GRANT THE BOCS ADDITIONAL INTERLATA RELIEF TO PROMOTE ADVANCED TELECOMMUNICATIONS SERVICES FOR SCHOOLS AND RURAL USERS

The NPRM asks whether the Commission should modify its policies for granting interLATA relief to the BOCs in order to ensure the deployment of advanced communications services on a reasonable and timely basis for schools and rural users.[84] CompTel fully supports making advanced services available to schools and rural users on a reasonable and timely basis. However, it is not necessary or wise for the FCC to modify its current policies in pursuit of that worthy goal. The Commission has not identified any issues that Congress did not anticipate, and provide for, when it adopted the 1996 Act. Nor is there any evidence that the 1996 Act and the Commission's policies have failed to address the needs of schools and rural users effectively. Particularly given Congress' express prohibition against removing the interLATA restriction under Section 271 until the BOCs have fully implemented its requirements, the Commission should not grant more expansive interLATA waivers.

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83 *Southwestern Bell Tel. Co. v. FCC*, No. 97-3389, 1998 U.S. App. LEXIS 18352, at *21 (8th Cir. Aug. 10, 1998) (emphasis added).

84 *NPRM*, ¶¶ 190-196.

Congress created several exemptions to make certain that schools and rural users receive reasonable and timely access to advanced services. *First*, Congress exempted rural ILECs from Section 251(c) in order to, among other things, promote access to advanced telecommunications and information services.[85] *Second,* in Section 271(g)(2), Congress removed from the interLATA restriction the BOCs' provision of "two-way interactive video services" and "Internet services" to elementary and secondary schools over the BOCs' dedicated facilities.[86] *Third,* Congress authorized the FCC to modify LATA boundaries, while limiting that authority by prohibiting the removal of the interLATA restriction until the Section 271 requirements have been "fully implemented."[87]

The first two exemptions were not entrusted significantly to the Commission. The rural ILEC exemption is expressly and solely the province of state regulators.[88] As regards the "incidental services" exemptions, the Commission's principal role is to ensure that the exemptions are not applied so broadly that they "adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[89] Further, Section 10(d) prohibits the Commission from expanding the scope of "incidental services" through its forbearance power.[90] While the Commission may retain authority to interpret and apply the statutory language, it should do so only in the context of a specific factual situation presented by a complaint or petition.

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85 47 U.S.C. §§251(f)(1); 254(b)(2)-(3).

86 47 U.S.C. §271(g)(2).

87 47 U.S.C. §§153(25); 160(d).

88 47 U.S.C. §251(f).

89 47 U.S.C. §271(h).

90 47 U.S.C. §160(d).

The principal exemption entrusted to the Commission is the authority to modify LATA boundaries. Even here the Commission's authority is circumscribed. By using the limited term "modif[y]," Congress meant to preclude the FCC from making "basic and fundamental" changes to LATA boundaries.[91] Congress underscored that limitation through Section 10(d), which prohibits the FCC from removing the interLATA restriction until Section 271 requirements are "fully implemented."[92] CompTel emphasizes these limitations not to downplay the benefits of extending advanced services to schools and rural users, but to emphasize critical role played by the interLATA restriction in Congress' statutory scheme. Section 271 constitutes the principal statutory incentive for the BOCs to comply with Section 251(c) and otherwise to open their local markets, and expansive LATA boundary changes would render that incentive significantly less effective.

Since the 1996 Act was adopted, the Commission has done a commendable job of modifying LATA boundaries on a case-by-case basis where necessary to promote the public interest without weakening significantly the interLATA restriction in Section 271.[93] CompTel urges the Commission to continue granting limited LATA boundary modifications on a case-by-case basis consistent with its prior decisions. Adopting a policy of more expansive interLATA waivers through LATA boundary changes would have several detrimental results.

First, it would actually provide an incentive for the BOCs to reduce their efforts to bring advanced services to schools and rural users in order to create a pretext for seeking interLATA

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91 *NPRM*, ¶81 (quoting *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994)).

92 47 U.S.C. §160(d).

93 *E.g., In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service at Various Locations*, 12 FCC Rcd 10646 (1997).

waivers. In so doing, it plainly would disserve the objectives the Commission is seeking to promote.

Second, the prospect of more expansive interLATA waivers would create an administrative nightmare, as the Commission (and industry participants) would be swamped by the hundreds or thousands of fact-specific requests which ILECs could be expected to submit. The Commission should not create a new, complex, burdensome regulatory regime when there is no reason to believe that the current system is not working effectively.

Third, more expansive LATA boundary changes – in particular, permitting BOCs to transmit data from rural areas to Internet access points in other states – would needlessly subvert the interLATA prohibition in Section 271. There is no feasible way for the Commission or the industry to police such waivers to make sure that the BOCs or their customers do not route voice or other basic traffic via these facilities. Further, there is no empirical reason to believe that the long distance industry is not effectively serving the needs of rural communities. Only one BOC has asked for a broad interLATA waiver for Internet transmissions, and the record developed in that proceeding has shown that a waiver is not necessary.[94] As a general matter, the Commission can reasonably rely upon competition among long distance carriers to ensure that the interLATA transmission needs in all regions of the United States are served fully at commercially reasonable rates. Rather than grant interLATA waivers where none are needed, the Commission should focus upon the real reason why advanced services are not more widely available – namely, the ILECs' patent and continuing failure to comply with Section 251(c) of the 1996 Act – through vigorous enforcement of statutory requirements and new rules designed to enable multiple

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94 *See* "Emergency Request of Bell Atlantic-West Virginia for Authorization to End West Virginia's Bandwidth Crisis," CC Docket No. 98-11, July 23, 1998.

parties to provide all types of telecommunications services to end-user subscribers at market-driven rates.

CONCLUSION

For the foregoing reasons, CompTel urges the Commission to take forceful action to ensure that Section 251(c) is fully implemented. The Commission should reform collocation practices to require ILECs to offer cageless collocation, and should implement a number of other reforms to ensure that collocation space is used more efficiently. In addition, the Commission should ensure that CLECs have access to transport functionalities necessary to offer competing advanced services. Finally, CompTel opposes the proposal to create an advanced services affiliate free from ILEC interconnection and unbundling obligations. Such an approach is contrary to the statute and potentially uncontrollable. If the Commission were to even consider such a path, it must adopt more rigorous separation requirements to ensure that an affiliate is "truly separate" and functions on an equal footing with unaffiliated CLECs.

Respectfully submitted,

THE COMPETITIVE
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ASSOCIATION

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March 23, 1998

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Secretary
Federal Communications Commission
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Washington, DC 20554

Re: Petition for Declaratory Ruling Or, In the Alternative, For Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act

Dear Ms. Salas:

On behalf of Competitive Telecommunications Association, the Florida Competitive Carriers Association and the Southeastern Competitive Carriers Association, enclosed for filing is the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act.

If you have any questions, please feel free to call me.

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association

Enclosures
cc: Attached service list

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Competitive Telecommunications Association,	)
Florida Competitive Carriers Association,	)
and Southeastern Competitive Carriers Association	)
	)
Petition On Defining Certain Incumbent LEC Affiliates	)
As Successors, Assigns, or Comparable Carriers	)
Under Section 251(h) of the Communications Act	)

PETITION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, FOR RULEMAKING

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,
FLORIDA COMPETITIVE CARRIERS ASSOCIATION, and
SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION

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Dated: March 23, 1998

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FEDERAL COMMUNICATIONS COMMISSION
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	)
Petition On Defining Certain Incumbent LEC Affiliates	)
As Successors, Assigns, or Comparable Carriers	)
Under Section 251(h) of the Communications Act	)

PETITION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, FOR RULEMAKING

The Competitive Telecommunications Association ("CompTel"), the Florida Competitive Carriers Association ("FCCA"), and the Southeastern Competitive Carriers Association ("SECCA"), pursuant to Sections 1.2 and 1.401 of the Commission's rules, 1/ request either a declaratory ruling or a rulemaking regarding the regulatory status of affiliates 2/ of incumbent local exchange carriers ("ILECs") -- such as BellSouth's affiliate, BellSouth BSE, Inc. ("BellSouth BSE") -- that provide wireline local exchange or exchange access service within the ILEC's service territory using the same or a similar brand name and common financial resources, personnel, and/or other resources of the ILEC or another corporate affiliate.

1/ 47 C.F.R. §§ 1.2, 1.401.

2/ In this petition, the term "affiliate" has the meaning defined in 47 U.S.C. § 153(1).

First, the Commission should issue a declaratory ruling that an ILEC affiliate that operates under the same or a similar brand name and provides wireline local exchange or exchange access service within the ILEC's region will be considered a "successor or assign" of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act ("Act"), and consequently that the affiliate itself is subject to the obligations of ILECs under Section 251(c). 3/ The Commission also should issue a declaratory ruling that such a CLEC affiliate will be treated as a "dominant carrier" for the provision of interstate service.

In the alternative, CompTel, FCCA, and SECCA request that the Commission propose a rule establishing a rebuttable presumption that an ILEC affiliate that provides wireline local exchange or exchange access service within the ILEC's service area under the same or a similar brand name is a "comparable" carrier under Section 251(h)(2). Such an affiliate would thus be subject to the Section 251(c) interconnection obligations of ILECs. That rulemaking proceeding should determine the criteria under which an in-region ILEC affiliate will be considered a "comparable carrier" under Section 251(h)(2).

BellSouth and other ILECs are transferring resources to affiliated companies to provide local and other telecommunications services within their service areas, and -- unless the Commission takes the requested actions -- could use these affiliates to avoid complying with important aspects of Section 251(c). A

3/ 47 U.S.C. § 251(c) & (h)(1)(B)(ii). As discussed below, such status as a "successor or assign" could be a rebuttable presumption.

declaratory ruling that such affiliates are "successors or assigns" would prevent such abuse and make it clear that the statutory dictates of Section 251(c) must be obeyed. A rule that such affiliates are "comparable carriers" would have the same result. And, as we demonstrate below, either the declaratory ruling or the rulemaking decision we seek would be fully consistent with the Act and with the Commission's precedent. 4/

(We note that CompTel, FCCA, and SECCA have no objections to an ILEC's establishing a CLEC affiliate to operate *outside* the ILEC's service territory, and we believe that these entities should *not* be treated as ILECs to the extent that they operate outside their ILEC affiliate's service territory. Such entry by an ILEC affiliate into another ILEC's territory is exactly the kind of competition that the Telecommunications Act of 1996 was intended to stimulate.)

I. THE COMMISSION SHOULD NOT COUNTENANCE ILECS' ATTEMPTS TO CIRCUMVENT THEIR INTERCONNECTION OBLIGATIONS BY ESTABLISHING SO-CALLED "CLEC" IN-REGION AFFILIATES.

A number of ILECs are establishing affiliated companies to operate, purportedly, as "competitive local exchange carriers" ("CLECs") within the ILECs'

4/ LCI International Telecom Corp. ("LCI") recently filed a petition in which it proposed a novel form of structural separation that would establish a voluntary "fast track" for Bell operating companies to comply with Section 271. LCI proposes that the retail affiliate of an ILEC that complies with the LCI plan would be deemed *not* to be a "successor," "assign," or "comparable" carrier under Section 251(h). *Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings* at 47-49 (filed Jan. 22, 1998). Without addressing the merits of LCI's proposals in this context, we note that LCI's arguments regarding Section 251(h) are fully consistent with the relief sought in this petition.

service areas. For example, BellSouth has set up an entity called "BellSouth BSE" which is intended to operate as a lightly-regulated CLEC both within and outside the operating territory of BellSouth Telecommunications (the ILEC corporate entity). BellSouth BSE has obtained, or is seeking, state certification to provide local telephone service in a number of states, including some states outside the BellSouth region, as well as statewide certification in every state in BellSouth's region. 5/ BellSouth states that BellSouth BSE will offer integrated packages of services, including local, wireless, Internet, and (once authorized) interLATA long distance services, to large business customers, and will offer local service primarily by reselling the services of BellSouth Telecommunications, which it will obtain through Section 252 interconnection agreements. 6/

5/ In addition to BellSouth's home states of Florida, South Carolina, North Carolina, Georgia, Mississippi, Kentucky, Alabama, Louisiana, and Tennessee, BellSouth BSE also has sought operating authority in Virginia, Ohio, Illinois, Indiana, and Hawaii. South Carolina Public Service Commission, *In re Application of BellSouth BSE, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Service in the State of South Carolina*, Docket No. 97-361-C, Hearing No. 9703 (November 5, 1997) ("SC PSC Hearing No. 9703"), Direct Examination of Robert C. Scheye, Vice President, Supplier Development and Business Relations for BellSouth BSE, Inc., at Tr. 3. Similarly, Ameritech, GTE, Pacific Bell, SNET, and others are establishing so-called CLEC in-region affiliates.

6/ Florida Public Service Commission, *In re Application for Certificate to Provide Alternative Local Exchange Telecommunications Service by BellSouth BSE, Inc.*, Docket No 971056-TX, Agenda Conference (October 7, 1997) ("FL PSC Agenda Conference") at Tr. 9 (statement of Harry Lightsy, General Counsel of BellSouth BSE, Inc.); South Carolina Public Service Commission, *In re Application of BellSouth BSE, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Service in the State of South Carolina*, Docket No. 97-361-C, Order No. 97-1063 (Dec. 23, 1997) at Tr. 6 ("SC PSC Order"); SC PSC Hearing No. 9703, Direct Testimony of Scheye at Tr. 4-5, Cross Examination of Scheye at Tr. 17, 19, 63-65, 74-75; Alabama Public Service Commission, *In re*

In on-the-record testimony in state proceedings, BellSouth representatives have admitted the following:

- BellSouth BSE is ultimately wholly owned by the same corporate entity that owns the BellSouth ILEC. 7/
- BellSouth BSE will present itself to customers using the same corporate name, logo, and other indicia of corporate identity as BellSouth Telecommunications, without paying BellSouth Telecommunications or its ratepayers anything for this use of corporate goodwill; 8/
- BellSouth BSE will be capitalized and funded entirely by BellSouth Corp., the holding company which also owns BellSouth Telecommunications, and will have access to the same capital and borrowing power as BellSouth Telecommunications, secured in substantial part by the assets and expected future earnings of BellSouth Telecommunications; 9/
- Certain high-level staff members, including some who had responsibility for negotiating interconnection agreements with independent CLECs, have been transferred from BellSouth Telecommunications to BellSouth BSE. 10/

BellSouth BSE, Inc., Docket No. 26192, Hearing (Nov. 19, 1997) ("AL PSC Hearing"), Direct Examination of Scheye at Tr. 17-19, Cross Examination of Scheye at Tr. 94-95.

7/ AL PSC Hearing, Cross Examination of Scheye at Tr. 40; SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 45.

8/ SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 16-17, 24-25, 76-77; AL PSC Hearing, Cross Examination of Scheye at Tr. 86-92.

9/ SC PSC Hearing No. 9703, Direct Testimony of Scheye at Tr. 12, Cross Examination of Scheye at Tr. 57-58; AL PSC Hearing, Direct Examination of Scheye at Tr. 16, *see also* SC PSC Order at Tr. 5.

10/ SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 42-43; AL PSC Hearing, Cross Examination of Scheye at Tr. 32, 55-57.

These and other factors demonstrate that BellSouth BSE is an alter ego that is in reality indistinguishable from BellSouth and BellSouth Telecommunications. Moreover, they show that BellSouth is transferring important resources, such as corporate goodwill, financing, and human capital, from BellSouth Telecommunications to BellSouth BSE. And we believe that BellSouth is not alone in this regard, and that such conduct is typical of the ILECs that are creating so-called CLEC affiliate companies.

When such a so-called CLEC entity provides service within its affiliated ILEC's local service territory using resources transferred from the ILEC (or from a parent company or other ILEC affiliate), it in effect could enable the ILEC to avoid complying with important provisions of Section 251. In the near term, the most likely provision to be violated is the resale requirement of Section 251(c)(4). For example, the so-called CLEC entity (BellSouth BSE) has stated that it plans, in particular, to target medium to large business customers, including those currently served by the ILEC corporate entity (BellSouth Telecommunications). 11/ By doing so, BellSouth would effectively transfer the customer-specific contract service arrangements ("CSAs") offered to those customers from itself to a nonregulated affiliate, thus exempting such CSAs from the Section 251(c)(4) requirement that these arrangements be offered to requesting carriers at a wholesale discount. 12/

11/ SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 61-62.

12/ 47 U.S.C. § 251(c)(4); 47 C.F.R. §§ 51.605, 51.613.

The Commission has already found that "BellSouth . . . appears to be attempting to avoid its statutory resale obligation by shifting its customers to CSAs. By foreclosing resale of CSAs, BellSouth can prevent resellers from competing for large-volume customers, thus hindering local exchange competition in South Carolina." 13/ Now that the Commission has made it clear that CSAs are subject to the statutory resale obligation, BellSouth appears to be trying a new approach to "hindering local exchange competition" -- shifting CSA customers from BellSouth Telecommunications to BellSouth BSE. 14/

The Commission should take decisive action to prevent this evasion of statutory obligations by BellSouth and other ILECs, by issuing a declaratory ruling and/or issuing a rule that so-called CLEC affiliates of ILECs providing in-region local service using resources transferred from the ILECs are to be treated as dominant ILECs under Section 251(h), and will be subject to the resale and other interconnection obligations of ILECs.

13/ *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina,* CC Docket No. 97-208, Memorandum Opinion And Order, FCC 97-418, ¶ 224 (released Dec. 24, 1997). *See generally id.*, ¶¶ 215-24 (rejecting BellSouth's Section 271 application in part due to its failure to offer wholesale discounts on CSAs, as required by Sections 251(c)(4) and 271(c)(2)(B)(xiv)); *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana,* CC Docket No. 97-231, Memorandum Opinion and Order, FCC 98-17, ¶ 63 (released Feb. 4, 1998) (same).

14/ In the longer term, ILECs could also attempt to use such affiliated entities to avoid complying with the unbundled network element ("UNE") requirements of Section 251(c)(3) and other interconnection obligations.

II. AN IN-REGION "CLEC" USING RESOURCES TRANSFERRED FROM ITS ILEC AFFILIATE SHOULD BE TREATED AS A "SUCCESSOR" OR "ASSIGN" UNDER SECTION 251(h)(1) AND AS A DOMINANT CARRIER.

The Commission should adopt a declaratory ruling that an ILEC affiliate providing local service within the ILEC's service territory using resources transferred from the ILEC is a "successor" or "assign" of the ILEC under Section 251(h)(1) and is a dominant carrier for the provision of interstate access and other interstate services. Such a declaratory ruling would resolve the current uncertainty over the regulatory status of these affiliates under Section 251(h)(1). And such a ruling would advance the public interest, by preventing an ILEC from abusing the corporate form of an in-region "CLEC" affiliate to avoid its interconnection and resale obligations 15/ as well as regulation as a dominant carrier.

The declaratory ruling sought by CompTel, FCCA, and SECCA is compelled by the statutory language of Section 251(h)(1). Section 251(h)(1) includes in the definition of "incumbent local exchange carrier" any "person or entity that, on or after such date of enactment, became a successor or assign" of an ILEC that provided telephone exchange service in an area on that date and was a member of the National Exchange Carrier Association ("NECA"). 16/

15/ *See supra* Section I.

16/ 47 U.S.C. § 251(h)(1)(B)(ii). *See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22055, ¶ 312 (1996) ("*Non-Accounting Safeguards Order*") (interpreting Section 251(h)(1)); Order on Reconsideration, FCC 97-52 (rel. Feb. 19, 1997); Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *petition for review denied sub. nom. Bell Atlantic v. FCC*, No. 97-1432 (D.C. Cir. Dec. 23,

First, the plain meaning of Section 251(h)(1) requires treating a corporate entity that is an ILEC's "affiliate," as defined in Section 3(1), and that provides telephone exchange service in the same areas as the ILEC under the same or a similar brand name and using resources transferred from the ILEC, as a "successor" or "assign" of that ILEC. An affiliated entity (such as BellSouth BSE) should be considered a "successor" of the ILEC under Section 251(h)(1) when it uses the same resources (brand name, financial resources, and/or human capital) in providing telephone exchange service to certain customers in the ILEC's local service area. In such cases, the affiliate essentially has replaced or "succeeded" the ILEC corporate entity. Such an entity should be treated as an "assign" of the ILEC under Section 251(h)(1) because the ILEC has transferred or "assigned" to it significant attributes of the ILEC, including corporate identity, financing, human capital, and at least part of the ILEC's customer base.

These interpretations of the meaning of the terms "successor" and "assign" are consistent with the common understanding of the terms in other fields of law: A corporate affiliate that is under common ownership and/or control of a company, using the same base of employees and/or other resources, and providing the same services in the same geographic area as that company, will be treated as a "successor" or "assign" to that company, and subject to certain of the company's

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1997); *petition for review pending sub nom. SBC Communications v. FCC*, No 97-1118 (D.C. Cir. filed March 6, 1997) (held in abeyance pursuant to court order issued May 7, 1997).

legal obligations. 17/ Likewise, an affiliate will be considered the "successor" of a company if the formation of the affiliate involves "a mere technical change in the structure or identity" of the original entity "without any substantial change in its ownership or management." 18/ This is particularly true where, as here, the formation of the affiliate appears to be intended to avoid the effect of a law. 19/

Moreover, the declaratory ruling requested by CompTel, FCCA, and SECCA is not inconsistent with the Commission's decisions regarding successors and assigns in the *Non-Accounting Safeguards Order*; 20/ indeed, it is a logical next step from that *Order*. The Commission concluded that, for purposes of Section 272 of the Act, an affiliate to which a Bell operating company ("BOC") has transferred network assets will be treated as a "successor or assign" of the BOC, and thus will be subject to the same Section 272 obligations as the BOC itself. 21/ For similar

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17/ *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43-46 (1987) (affirming agency decision to deem a new entity a "successor" of, and thus subject to certain labor relations obligations that applied to, the pre-existing enterprise, when the new entity "acquired substantial assets of its predecessor[,]" a majority of the new entity's employees had been employees of the predecessor firm, the new entity served a substantially overlapping customer base, and the new entity provided the same goods or services as the predecessor firm); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170-72, 183 n.5 (1973) ("*Golden State*") (same).

18/ *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel and Restaurant Employees and Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249, 259 n.5 (1974) ("*Howard Johnson*"). *See also Golden State*, 414 U.S. at 176-77.

19/ *Howard Johnson*, 417 U.S. at 259 n.5.

20/ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054-55, ¶¶ 309-11.

21/ *Id.*

reasons, an affiliate to which an ILEC has transferred anything that would be of value in providing in-region local service, such as brand name, capital, or personnel, should be treated as a "successor or assign" (or, as we discuss below, a "comparable" carrier) 22/ and should be subject to the same Section 251 obligations as the ILEC itself.

To be sure, the Commission stated in the *Non-Accounting Safeguards Order* that "a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) *solely* because it offers local exchange service; rather, 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h)." 23/ But the *Non-Accounting Safeguards Order* does not address how the Section 251(h) criteria for treating affiliated entities as ILECs would be satisfied. 24/ The Commission should clarify, by issuing the requested declaratory ruling, that Section 251(h)(1) will be triggered if the ILEC affiliate is providing wireline local exchange or exchange access service in the ILEC's region under the same or similar brand names. 25/

22/ *See infra* Section III.

23/ *Id.* at 22055, ¶ 312 (emphasis added).

24/ Nor did the Commission consider whether the analysis would be different for affiliates providing in-region and out-of-region services. CompTel, FCCA, and SECCA would contend that an ILEC affiliate providing local service outside the ILEC's service territory should *not* be classified as an ILEC under Section 251(h). *See supra* at 3.

25/ In particular, CompTel, FCCA, and SECCA recommend that the Commission adopt, by declaratory ruling, a rebuttable presumption that "successor or assign" status will apply, unless the presumption is rebutted, to any entity that: (1) is an "affiliate" of an ILEC under the definition in Section 3(1) of the Act; (2) is providing

Finally, the Commission should, by declaratory ruling, hold that such in-region "CLEC" affiliates of ILECs will, unless the presumption is rebutted, be treated as dominant carriers with respect to interstate access service and any other jurisdictionally interstate services that they provide. As ILECs themselves (or as ILEC "successors" or "assigns"), these entities fall squarely within the Commission's existing determinations of which carriers have market power. 26/ And, while the Commission did decide in the *Regulatory Treatment Order* to treat as non-dominant the affiliates of BOCs and other ILECs that provide stand-alone, in-region interstate *long-distance* service, 27/ that decision has no relevance to the treatment of these *local* affiliates' in-region interstate services, such as interstate access. The decision in the *Regulatory Treatment Order* was based in large part on the rationale that an affiliate of a BOC or other ILEC that begins providing in-region long-distance service will be a newcomer in a maturely competitive marketplace. 28/ By

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local exchange or exchange access service on a wireline basis in any geographic area served by the ILEC; and (3) uses any corporate or brand names that are the same or similar to those of the ILEC affiliate. The burden would be on the ILEC affiliate to rebut this presumption and show that it is not a "successor or assign" of the ILEC.

26/ *See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 20-22 (1980).

27/ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142 (released Apr. 18, 1997) ("*Regulatory Treatment Order*"). That decision also did not address the regulatory treatment of bundled, "full-service" offerings that include both local and long-distance service.

28/ *See, e.g., id.* at ¶ 96.

contrast, in this case the "CLEC" affiliate will be providing the same interstate access and other local services that the ILEC itself provides on a near-monopoly basis, and the affiliate entity will be largely indistinguishable from the ILEC itself. It therefore should be treated as a dominant carrier, and should be subject to the same access charge, price cap, and other rules that apply to ILECs.

III. THE COMMISSION SHOULD ADOPT A RULE THAT AN ILEC AFFILIATE PROVIDING IN-REGION LOCAL SERVICE USING RESOURCES TRANSFERRED FROM THE ILEC IS A "COMPARABLE" CARRIER UNDER SECTION 251(h)(2).

As an alternative to the declaratory ruling discussed above, the Commission should initiate a proceeding to establish a rule clarifying the criteria under which an ILEC's affiliate will be considered a "comparable" carrier to the ILEC under Section 251(h)(2). Specifically, CompTel, FCCA, and SECCA propose that the Commission adopt a rule that an ILEC-affiliated carrier will be treated as a "comparable" carrier if it provides local service in the same geographic area as the ILEC and if the ILEC has transferred anything of value, including brand names, financial resources, or human capital, to the affiliate. 29/

Section 251(h)(2) provides that the Commission may treat a LEC (or category of LECs) as an ILEC if--

> (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

29/ The same rebuttable presumption discussed above could be employed. *See supra* note 25.